NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

HERMAN PETERSEN, ET AL. Plaintiffs v. UNITED STEELWORKERS OF AMERICA and USWA LOCAL UNION 8545 Defendants	)	CIVIL NO. 2004/0062

ATTORNEYS:

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MEMORANDUM OPINION

This matter comes before the Court on Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted. For the reasons expressed herein, Defendants' motion to dismiss will be denied.

I. Background

Plaintiffs were employees of Innovative Communications Corporation (ICC) and as

members of the union, were represented by Defendants United Steelworkers of America and USWA Local Union 8545. In September 2002, union representatives recommended that Plaintiffs go on strike because of failed contract negotiations. Defendant union assured Plaintiffs that they would not lose their jobs for striking because the law prohibited ICC from taking such action. Plaintiffs engaged in a strike from October 1, 2002 through the end of November 2002. The union and ICC reached a strike settlement agreement on November 25, 2002 and ICC informed Plaintiffs that they had been permanently replaced at some time subsequent to the settlement. The union told Plaintiffs that they would challenge ICC's actions before the National Labor Relations Board (NLRB) and that the Plaintiffs would be rehired. The union filed a NLRB claim against ICC which was appealed and decided in favor of ICC by an arbitrator on February 18, 2004. The arbitrator, having classified the strike as economic, determined that the employer, ICC, had not gone outside the scope of fair labor practices in terminating the plaintiff-employees because they were on strike.

Employee Plaintiffs filed a class action complaint against union Defendants for breach of duty of fair representation under the National Labor Relations Act (NLRA), 29 U.S. C. § 159 in April of 2004. In their complaint, Plaintiffs allege that the Defendants violated their duty of fair representation on two counts, first by acting in bad faith when they told Plaintiffs that they could not lose their jobs by striking and second by failing to provide for Plaintiffs re-employment when they negotiated the settlement agreement with Plaintiffs' employer, ICC. Defendants now move to dismiss the claim under a 12(b)(6) motion alleging that the Plaintiffs' compliant is time barred by the NLRA six-month statute of limitations.

At issue in this matter is whether the NLRA statute of limitations applies and when the statutory period began. Under the NLRA, the statute of limitations is six months. Plaintiffs filed their complaint in April of 2004. Defendants argue that the accrual date should be November 25,

2002, the date that the Defendants allege Plaintiffs became aware that they had lost their jobs. Plaintiffs argue that accrual began on February 18, 2004, the date when Plaintiffs learned of the arbitrator's decision in favor of ICC.

II. Analysis

A. Standard of Review for a 12b6 Motion to Dismiss

When analyzing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court "accept[s] as true the allegations in the complaint and its attachments, as well as reasonable inferences construed in the light most favorable to the plaintiffs." U.S. Express Lines, LTD. v. Higgins, 281 F.3d 383, 387 (3d Cir. 2002). "[T]he district court's order granting the defendants' motion to dismiss will be affirmed only if it appears that the plaintiffs could prove no set of facts that would entitle them to relief." Langford v. City of Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000).

B. The Statute of Limitations

Both parties agree that the six-month statute of limitations period under the National Labor Relations Act is applicable in this case. The Act states:

> That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...
>
> 29 USCS § 160 (b)

The NLRA six month statute of limitations standard has been held to apply instead of applicable state law when there is a hybrid action by an employee against both the employer and the union for unfair labor practices under § 301 of the Labor Management Relations Act, 29

U.S.C.S. § 185 and breach of the union's duty of fair representation. Del Costello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (U.S. 1983).

Here, Plaintiffs are suing only the union for breach of duty of fair representation. Del Costello provides that either claim, against employer or union, can stand alone in federal court because each has an independent jurisdictional basis. Id. The Supreme Court limited Del Costello in Reed v. United Transportation Union, 488 U.S. 319 (1989) by holding that a free speech claim against a union should be governed by state statute of limitations instead of the NLRA statute because "free speech and association rights in order to further union democracy ... simply had no part in the design of a statute of limitations for unfair labor practice charges." Id. at 332.

The Third Circuit has interpreted Reed in Brenner v. United Brotherhood of Carpenters & Joiners, 927 F.2d 1283, 1295 (3d Cir. 1991) where they drew 'a distinction for limitations purposes between those claims "normally intertwined with the day-to-day relationship between management and labor," for which the six-month section 10(b) limitation period is appropriate, and those claims which have little similarity to an unfair labor claim and where "the need for speedy resolution of the dispute is therefore not present."' Brenner (quoting Grasty v. Amalgamated Clothing & Textile Workers Union, 828 F.2d 123 (3d Cir. 1987). In the present case, the Plaintiffs' claim is an unfair labor claim therefore making the six-month statute of limitations appropriate.

Because neither party contests that the NLRA statutory period should apply in this case and based on the analysis set forth in Brenner, the Court finds that the NLRA six-month statute of limitations applies.

C. Accrual Date for the Statute of Limitations

Having resolved that the NLRA's six-month statute of limitations applies in this case, the issue before the Court is to determine when the statutory period should begin on both alleged counts of breach of duty. The applicable standard as pronounced in Hersh v. Allen Products Co., 789 F.2d 230, 232 (3d Cir. 1986), is that the statute of limitations should begin to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." Id. (quoting Metz v. Tootsie Roll Industries, Inc., 715 F.2d 299, 304 (7th Cir. 1983)).

In the matter before the Court, the first alleged violation is that the union breached their duty to the Plaintiffs by representing that they could not lose their jobs by striking. Based on the standard in Hersh, the six-month statute of limitations would begin when the Plaintiffs knew or should have known that the union's representation was reckless and in bad faith.

The Court finds that the relevant date is when Plaintiffs became aware that the union was wrong in their representation that the ICC could not fire employees who went on strike. Plaintiffs allege in their opposition to Defendants' Motion to Dismiss that they were not aware of the union's misrepresentation until the arbitrator's final decision on February 18, 2004. Defendants allege that Plaintiffs should have been aware either when they found out that they had been terminated sometime on or after November 25, 2002 or when the NLRB ruled for ICC prior to the union's appeal to the arbitrator. Viewing the facts presented in a light most favorable to the Plaintiffs, the relevant date could be February 2004 when the arbitrator reached his or her final decision on the dispute if it was at that time that the Plaintiffs first became aware that the union's assertion of the law was wrong because the ICC termination of employees on economic strike was legal. Once Plaintiffs became aware of the law, they would or should have discovered that union was reckless or acted in bad faith in their legal representation to Plaintiffs. However, from the facts presented the Court cannot determine from what date the statutory period should

run.

Plaintiffs also allege that the union breached its duty of fair representation by failing to provide for Plaintiffs re-employment in the settlement agreement with ICC. In applying the standard set forth in Hersh, the Third Circuit found in Vadino v. A. Valey Engineers, 903 F.2d 253 (3d Cir. 1990), where an employee sued a union for breach of its duty of fair representation, the court decided that the statute of limitations began when "the plaintiff receives notice that the union will proceed no further with the grievance." Id. (quoting Hersh). Applying Vadino to the present case the Court finds that the Plaintiffs may have had reason to believe that the union was representing them up until the final decision of the arbitration proceedings. Again, it is not clear from the complaint when date this was.

III. Conclusion

Having determined that the NLRA's six-month statute of limitations does apply in this case and applying the Hersh standard, the Court finds that the statute of limitations should begin as of the date when the Plaintiffs became aware of the union's misrepresentation. Plaintiffs may have been aware of the union's misrepresentation as early as November 25, 2002 if that is when they found out that they had lost their jobs with ICC or as late as the arbitrator's final decision in February 18, 2004. Because the exact date of Plaintiffs' awareness of the union's alleged breach of duty cannot be determined from the Plaintiffs' complaint, the Court cannot assess whether the statutory period has passed. Viewing all reasonable inferences in a light favorable to the Plaintiffs, it is not beyond doubt that the Plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. For the foregoing reasons, Defendants' Motion to Dismiss for Failure to state a claim upon which relief can be granted is denied.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

HERMAN PETERSEN, ET AL.	)
	)
	)
Plaintiffs	)
	)

v.	)	CIVIL NO. 2004/0062
	)	
	)	
UNITED STEELWORKERS OF AMERICA and USWA LOCAL UNION 8545	)	
	)	
	)	
	)	
Defendants		

ORDER

This matter comes before the Court on Defendants' Motion to Dismiss, docket # 13. For the reasons stated in the attached Memorandum Opinion, it is hereby

ORDERED that Defendants' motion is **DENIED**.

ENTER:

DATED: August 30, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

ATTEST:
Wilfredo F. Morales
CLERK OF THE COURT

By: _____
Deputy Clerk

cc: Hon. George W. Cannon
Vincent Colianni II for Plaintiff
Jessica Gallivan for Defendant